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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LEON ALPERT, an individual, on behalf of
himself, on behalf of all those similarly
situated, and on behalf of the general public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a Delaware
corporation, and DOES 1 TO 100,
Defendants.

) Case No. 08 CV 582 W WMc

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES FOR REMAND FOR**
) **LACK OF FEDERAL JURISDICTION**

) Date: June 16, 2008

) Time: 10:00 a.m.

) Place: Courtroom 7

) Judge: Hon. Thomas J. Whelan

) [No Oral Argument Pursuant to LR 7.1(d)(1)]

) Complaint filed: March 13, 2007

) Removal: March 27, 2008

1 **I. INTRODUCTION**

2 Plaintiff's action arises from the fact that Time Warner Cable (TWC) overcharges its
3 customers that reside in homeowners associations (HOAs) that have exclusive contracts with TWC
4 to provide basic cable. While the basic cable fee is negotiated to entice HOAs into such
5 agreements, HOA homeowners are then systematically overcharged by TWC for each "additional
6 service" they purchase (e.g., digital TV, premium movie channels, Roadrunner internet access,
7 digital telephone service, etc.). The overcharge is the difference between what HOA customers
8 must pay for those specific additional services as compared to non-HOA customers that order
9 exactly the same set of additional services. In other words, TWC uses its exclusive agreements
10 with HOAs to lock in customers and then overcharges those customers when they upgrade to
11 additional services such that the customers would have been better off had their HOA had no
12 agreement with TWC at all. The FCC recently ruled that such exclusive cable agreements with
13 HOAs are unlawful.

14 Although this action has been pending in state court for over a year now, TWC recently
15 removed after receiving plaintiff's opposition to TWC's motion for summary judgment in state
16 court and before TWC filed its reply brief thereto. TWC removed this California Business &
17 Professions Code section 17200 class action claiming that it now meets the jurisdictional limit
18 under the Class Action Fairness Act (28 U.S.C. section 1332(d)) ("CAFA") and because it
19 purportedly is a claim that "arises under" federal law. Neither is true.

20 TWC's CAFA jurisdictional argument is predicated on numerous assumptions that defy
21 common sense and which lack evidentiary support. For example, TWC's removal necessarily
22 presumes that every HOA has exactly the same basic cable charge (\$ 28.77) as paid by the 250
23 residents of plaintiff's HOA (SeaPoint). Since TWC enters into separate agreements with each
24 HOA, and since each agreement is individually negotiated between TWC and the HOA, there is no
25 reason to believe, nor does TWC provide any evidence to support, its proposition that each HOA
26 had exactly the same price for basic cable as SeaPoint did.

27 TWC's Removal also necessarily presumes that each class member ordered exactly the

1 same set of additional services as did plaintiff Alpert (e.g., Roadrunner, Digital Cable, telephone,
2 the exact same set of four premium movie channels, and so on). Because plaintiff Alpert ordered
3 most of the additional services and features TWC offered, it does not follow that everyone else did.
4 In addition to the fact that such a wild assumption defies common sense, TWC's own PMK
5 testified that many (almost half) of TWC's HOA customers order *no additional services at all*.
6 Those who ordered less and cheaper additional services would have significantly smaller
7 overcharge amounts as well. In the removal papers TWC simply offers no evidence as to the
8 amount of overcharge on customers who ordered fewer and less expensive additional services than
9 plaintiff did.

10 Compounding the deficiency further, from the Class quantum must also be adjusted
11 downward for those class members who were put into the "HOA Bundle" pricing system, which
12 TWC used for two years of the class period. TWC had a special "HOA Bundle" pricing which
13 removed most of the overcharges but did not publicize it to HOA customers, disclose it in ads, or
14 make it available unless an HOA customer asked for it, or otherwise complained about their bill.
15 The non-disclosure of this "stealth" pricing system is alleged to be deceptive under §17200. From
16 the amount in controversy must further be subtracted to those class members who were given the
17 "HOA Bundle" price for part of the class period. TWC has not shown or disclosed how many such
18 customers there were, or what time periods they were covered by this "alternate" pricing system.

19 TWC cannot simply multiply the total number of HOA customers by the overcharge to this
20 particular plaintiff so as to determine class-wide overcharges/restitution – yet that is exactly what
21 TWC did in its removal papers. Many, if not most, of those HOA customers are not even class
22 members and did not order any additional services at all. To reach the CAFA limit, TWC has
23 simply multiplied plaintiff's damage figure by thousands of non-class member HOA customers that
24 ordered no additional services whatsoever.

25 Without knowing the basic cable charge for each HOA member of the class, and without
26 knowing what additional services were ordered by each class member, or statistics summarizing
27 this information, it is impossible to calculate potential overcharges on a class-wide basis.

1 Certainly, TWC has failed to meet its burden of showing by the preponderance of evidence that
2 this case meets the CAFA jurisdictional requirement and predicates its Notice of Removal on
3 erroneous and unsupportable assumptions. TWC has simply manufactured CAFA jurisdiction
4 without any evidentiary support and where no such jurisdiction exists.

5 As for TWC's federal question argument, both federal and state court decisions hold that
6 Section 17200 claims can be predicated on violations of both state and federal law, and that if the
7 underlying law that is "borrowed" is a federal law or regulation, that does not create or confer
8 federal question jurisdiction. The action remains solely a state law claim under Section 17200.
9 Also, a removal based on federal question jurisdiction is not a CAFA removal and is untimely
10 under 28 U.S.C. §1446(b).

11 TWC's removal was improper. This case should be remanded to state court.

12
13 **II. TWC HAS NOT SHOWN THIS CASE MEETS THE CAFA JURSDICTIONAL**
AMOUNT IN CONTROVERSY

14 Remand may be ordered either for lack of subject matter jurisdiction or for any defect in
15 removal procedure. 28 U.S.C. §1447(c). Here, TWC cannot and does not meet its burden of
16 demonstrating that the class's claims meet the \$5,000,000 jurisdictional amount required under
17 CAFA.

18 It is well settled that CAFA does not "alter the long-standing rule that the party seeking
19 federal jurisdiction on removal bears the burden of establishing that jurisdiction." *Abrego v. Dow*
20 *Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *Lowdermilk v United States Bank Nat'l Assn.*, 479
21 F.3d 994 (9th Cir. 2007). Where, as here, the amount in controversy is not alleged in the complaint,
22 a removing defendant has the burden of proving by the preponderance of the evidence that the
23 amount exceeds \$5,000,000. *Lowdermilk, id.*, at 998-9. In its Notice of Removal, TWC presents
24 no competent evidence that this case meets the CAFA jurisdictional limit because its calculation is
25 based on fundamentally flawed assumptions. Instead, TWC relies solely on plaintiff's expert's
26 declaration filed in opposition to TWC's recent summary judgment motion in state court, and then
27 makes numerous wrong assumptions in an attempt to create, and exaggerate, an aggregate value of
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1 the class' claims based on pure speculation. Speculation can never be a basis for establishing
2 jurisdiction.

3 Specifically, TWC argues that since plaintiff's expert estimates that plaintiff suffered
4 damages of \$ 25.80 per month (Notice of Removal at p.3:20), that must also be true for everyone in
5 the class, which TWC estimates is about 56,000 HOA customers. *Id.* at p.3:25. TWC's
6 assumptions make no sense and are contradicted by what TWC knows to be true.

7 Plaintiff is a member of an HOA called SeaPoint which consists of about 250 units. Decl.
8 Alpert in Opp to TWC's MSJ at para. 7 (submitted by TWC in its Notice of Removal, Ex. I).
9 SeaPoint has a "bulk services" agreement with TWC for basic cable whereby SeaPoint residents
10 pay \$ 28.77 each month for basic cable through their HOA. Decl. Nutten in Opp to TWC's MSJ,
11 para. 4 (submitted by TWC in its Notice of Removal, Ex. I). This was substantially below what a
12 non-HOA customer paid for basic services. However, when plaintiff ordered additional services
13 (i.e., other than and above basic cable), he was overcharged for those services by TWC in the total
14 sum of \$ 25.80 per month. *Ibid.* This was the difference between what plaintiff paid for these
15 upgrade and what a non-HOA customer was charged for the same additional service upgrades.
16 Plaintiff's additional services consisted of most everything TWC offered --- digital TV, all four
17 premium channels (HBO, Showtime, etc.), Roadrunner internet service, and digital telephone
18 service.

19 TWC removal papers simply multiply Alpert's restitution claim by all 56,000 customers
20 who lived in HOAs with bulk basic service contracts. This makes no sense. First, according to
21 TWC's state court testimony, almost half of the customers order no additional services at all (the
22 PMK testimony was about 45% do not). Second, of those that do, most do not order everything on
23 the menu and only order a premium channel upgrade or digital TV. (The large overcharges were
24 on the high-end upgrades such as internet service and digital telephone, around \$25 a month for
25 both; the overcharges for the lesser upgrades was small, a few dollars in some cases). TWC makes
26 no showing how many customers fell into these various categories of limited additional services
27 and what the overcharge is for these customers. Third, TWC assumes that every HOA bulk basic
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1 service contract is at SeaPointe's rate of \$28.77 per unit per month -- although again the state court
2 testimony is that each HOA contract is separately negotiated. Variation in these rates has an
3 impact on the quantum of overcharge. In sum, TWC's damage "calculation" is completely flawed
4 as it is missing the number of customers actually upgrading to additional services (a threshold
5 requirement for even being in the class definition), whether and by how much their HOAs
6 negotiated rates below what the general public was charged for basic service, and how many
7 customers actually purchased which additional services as the quantum of overcharge varied
8 significantly based on what was ordered.

9 While TWC cites to 56,000 *potential* class members living in HOAs, the actual testimony is
10 that only about 55% of these, or about 30,800, buy additional services and are in the class. Decl. of
11 Barron Ramos in Opposition to Motion for Summary Judgment (submitted by TWC in its Notice
12 of Removal as Exhibit I), Exh. A, Rhodes Dep. at 153:23-154:11. Of these, without other data
13 as to actual additional services upgrades by class member and amounts HOAs paid for basic
14 service, it has not been shown that the amount in controversy exceeds \$5,000,000. The quantum
15 per class member may have been as low as a dollar or two a month, or as high as \$25 or \$26.

16 TWC's removal simply presumes without any evidence whatsoever that (i) each member of
17 an HOA with a bulk basic service contract from TWC is in the class; (ii) each member of the class
18 was a resident in an HOA that paid exactly the same sum as SeaPoint for basic cable each month,
19 and (iii) that each member of the class had ordered exactly the same services as Mr. Alpert so as to
20 result in the same overcharge figure per resident. These wrong assumptions are not based on any
21 evidence and are contradicted by common sense.

22 TWC has provided neither plaintiff nor the Court with contracts with other HOAs, nor with
23 a summary thereof, nor an affidavit from an expert or employee to support TWC's position that
24 each HOA had exactly the same basic cable rate (\$ 28.77) as did SeaPoint. On this basis alone,
25 there is no way to ever extrapolate the quantum of damage per class member since it is necessarily
26 a function of the basic cable rate paid by the HOA in each instance.

27 Second, TWC has provided neither plaintiff nor the Court with any evidence that each
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1 member of the class had ordered the same quantum of additional services as plaintiff Alpert such
 2 that the overcharge figure for Mr. Alpert can be assumed to be the same for every other class
 3 member. Mr. Alpert had ordered a significant list of additional services including Roadrunner
 4 wireless, telephone services, digital cable, multiple premium movies, and so on. TWC's rank
 5 speculation that every member of the class ordered exactly the same basket of services as did Mr.
 6 Alpert is totally unsupported by any evidence and defies common sense. In fact, TWC knows that
 7 only a fraction of its total customers actually ordered any additional services at all. TWC's PMK
 8 testified that almost half of TWC's customers do not order additional services at all. Thus, TWC
 9 asks this Court to presume something it knows is false to try to meet the CAFA limit.

10 Every customer of TWC that resides in an HOA is not a class member. Paragraph 4 of the
 11 FAC defines the class as follows:

12 The class in this case is comprised of all TIME WARNER
 13 subscribers in the State of California during the four (4) years prior to
 14 the filing of this complaint who were members of homeowners
 15 associations (HOAs) and/or tenants of such members, where the
 16 subscriber's HOA had contracted with TIME WARNER for basic
 17 cable services (also sometimes called "bulk multi-channel video
 18 services") ***and where the subscriber purchased additional cable and
 cable related services directly from TIME WARNER but was not
 provided a credit for already paying the for basic cable services
 ("HOA Standard Service") through the subscriber's HOA.***
 (Emphasis added)

19 The class is not defined as broadly as TWC says it is in its Removal so as to include all
 20 HOA customers. Many of those customers ordered no additional services and are not members of
 21 the class. TWC cannot redefine the Class to meet the CAFA jurisdictional limit just as TWC
 22 cannot grossly overestimate, without any evidentiary support, the potential damages suffered by
 23 each class member in an effort to satisfy the amount in controversy.

24 In sum, TWC has presumed that every HOA has exactly the same basic cable charge as
 25 paid by the residents of SeaPoint, presumed that each class member ordered exactly the same
 26 basket of services as did plaintiff Alpert, and presumed that every member of an HOA orders
 27 additional services. *None* of those presumptions are true and *none* of them are supported by any
 28 evidence whatsoever. TWC's fails to meet its burden of showing jurisdiction under CAFA by the

preponderance of competent evidence.

III. THIS CASE IS NOT BASED UPON A FEDERAL QUESTION

Plaintiff's class action complaint states one sole cause of action: violation of California's B&P Code section 17200 (Section 17200). See FAC, paras. 36-44. No federal claim is stated. Section 17200 claims may be predicated on the violation of other law, including federal law. *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588, 591 (1970). As the California Supreme Court has stated, Section 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under Section 17200. *Farmers Ins. Exch. v. Superior Court*, 2 Cal.4th 377, 383 (1992).

TWC argues in its Notice of Removal that because plaintiff has referenced the FCC's Order of October 31, 2007 (which now recognizes that TWC's exclusive contracts with SeaPoint and other HOAs are unlawful) in briefing in opposition to TWC's recent motion for summary judgment in state court, plaintiff's action suddenly morphed into a federal claim "aris[ing] under" the laws of the United States. Notice of Removal at p.4:12. TWC is wrong. This is not a case brought under federal law – it is brought solely under Section 17200. The fact that predicate unlawful violations include a potential violation of federal law changes nothing.

Like here, in *Schwartz v. Visa International Corp., et al.* (ND Cal.) 2001 U.S. Dist. LEXIS 105, defendants removed "based on their belief that plaintiff had raised federal claims in [a] brief opposing a motion for judgment on the pleadings in state court." *Id.* at *2. The complaint stated violations of Section 17200 and were predicated on violations of both state and federal law, including the Truth in Lending Act (TILA) and the Sherman Antitrust Act. *Id.* at *3.

The *Schwartz* court remanded stating that "defendants' position would be viable only if section 17200 could not be predicated on the violation of federal law." *Id.* at *6. Citing the California Supreme Court in *Farmers Ins. Exchange, supra*, the District Court concluded that Section 17200 actions redresses unlawful business activities by borrowing violations of other laws, including federal law, as "unlawful practices independently actionable under section 17200 et sq.

1 and subject to the distinct remedies provided thereunder.” *Id.* at *8.

2 Federal law, just like state law, may be “borrowed” by Section 17200. *Mangini v. R. J.*
 3 *Reynolds Tobacco Co.*, 793 F.Supp. 925, 927 (N.D. Cal. 1992). Here, just as in *Schwartz*, “since
 4 plaintiff has not raised any independent federal claims, there can be no basis for federal jurisdiction
 5 in this case, and the Court’s analysis is concluded.” *Ibid.*

6 Moreover, removal based on an alleged federal question under 28 U.S.C. §1331 is *not*
 7 removal under CAFA. More than one year has passed between the commencement of the action
 8 and removal and thus the removal based on federal question is impermissibly late under 28 U.S.C.
 9 §1446(b).

11 IV. CONCLUSION

12 TWC fails to prove by the preponderance of the evidence in its Notice of Removal papers
 13 that the amount in controversy alleged in the FAC aggregates to the jurisdictional amount of this
 14 Court under CAFA. TWC also incorrectly argues that a Section 17200 claim predicated on an
 15 unlawful business practice under federal law raises a federal question under §1331. It does not.
 16 Also, the removal under §1331 is too late under §1446(b).

17 This action should be remanded to state court.

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 19
 20 Dated: April 25, 2008

CLARK & MARKHAM LLP

21 By: /s/David R. Markham
 22 David R. Markham,
 23 Attorney for the Plaintiff, Leon Alpert